

Plan B: Housing New Yorkers on State Land

By Karen Meara and Christopher Rizzo

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In the 2023 budget, Gov. Kathy Hochul attempted to include several game-changing ideas for advancing affordable housing in New York State. The most significant element was a so-called “builder’s remedy” law that would allow builders to bypass local zoning limits in municipalities that failed to amend their zoning codes to allow a specific level of new housing development each year. We explored New York’s attempt in our July 23, 2023 column, [“N.Y. Looked Seriously at Builder’s Remedy Law to Address Affordable Housing Shortage,”](#) and noted that New Jersey, Massachusetts, and a few other states have successfully embraced similar laws to force municipalities to accommodate new housing. The N.Y. legislature removed it from the budget when certain legislators, mostly from suburban districts, objected.

In the 2024 budget, the governor turned her attention to a more modest goal: getting state agencies and public authorities to facilitate housing development on state-owned land. In 2023, the governor ordered all agencies to identify land in their portfolios that could be made available for housing development. Pursuant to this initiative, “Redevelopment of Underutilized Sites for Housing,” the governor will allocate millions of dollars to capital improvements on state-owned sites to spur private development and create 15,000 new housing units. However, 15,000 units will not, by themselves, make a big dent



Christopher Rizzo and Karen Meara, Carter Ledyard & Millburn.

in a state that is short 500,000 to 800,000 units of housing. The governor’s program will, however, pilot a potentially transformational approach to expanding housing in the face of municipal-level resistance: using state-controlled entities to bypass local zoning limits and encourage developers to build housing on state land.

This is not an entirely new idea. The state created the Urban Development Corporation (d/b/a Empire State Development or ESD), Roosevelt Island Operating Corporation, Battery Park City Authority, and other state-controlled entities in the 1960s and 1970s to create tens of thousands of new units on state land unconstrained by local approval processes. These authorities succeeded, but not without delays, controversy, and litigation. For

various reasons, new housing production on state land has slowed dramatically, and public authorities turned their attention to infrastructure, universities, and economic development. The governor is directing all agencies and public authorities to return their attention to housing, look statewide, and focus on land already under state control.

The Governor Directed State Agencies to Evaluate Their Land Holdings to Accommodate New State-Supported Affordable Housing

On July 18, 2023, the governor issued an executive order to all state entities (including agencies, authorities, and public benefit corporations) to review “any parcels of developed and undeveloped land under their ownership and control to identify potential sites for housing development ...” calling out state universities, the Metropolitan Transportation Authority, and the Department of Transportation in particular. Notably, state entities own 1/3 of the land in New York—the biggest share of any state in the U.S. While most of that land is not available for development and includes much parkland and conservation land, a significant chunk of it is (think former prisons, hospitals, industrial sites, unused transportation corridors, etc.). As part of the 2024-2025 budget negotiation, the governor agreed with the legislature to allocate up to \$500,000,000 for capital improvements intended to facilitate private development of 15,000 new housing units on state land.

New York State Has Hundreds of Public Authorities; Only a Few Are Likely to Play a Major Role in Housing

In addition to the usual government agencies (e.g., Department of Transportation, Department of Education, etc.), the state controls at least 104 public authorities, which includes at least 48 public benefit corporations that are governed by specific statutes. (This count does not include at least 479 locally controlled public authorities that are not likely to have a role in the latest initiative.) This staggering group of public authorities conducts much of the state’s business and controls much of the state land that might

be available for housing development. Most, however, have very narrow purposes or very specific geographic jurisdiction (e.g., development of a specific port facility, oversight of gaming lands). But a few operate statewide and have broad missions including the Dormitory Authority, Empire State Development, and the Housing Finance Agency and its related housing authorities. These authorities are likely to take the lead in implementing the Redevelopment of Underutilized Sites for Housing, including on land under the control of sister agencies.

Per the Court of Appeals, Government Entities Have Broad Authority to Override Zoning (but Not Always)

Until 1988, government entities in New York could override local zoning only when carrying out their “governmental” duties rather than “proprietary” duties. That year, the Court of Appeals recognized the difficulty in applying such a test in New York, which abounds with special-purpose public authorities dedicated to economic development, housing, and other development-driven missions. In *The Matter of County of Monroe*, 72 N.Y.2d 338 (1988), the court adopted the more permissive “balancing of public interests” test to determine when governmental entities can override zoning. The first step is to determine if the state legislature has indicated its intention with regard to any agencies’ ability to override or be subject to local zoning. Where statutes are silent, a governmental entity may still justify its override of zoning after weighing several factors, including the importance of the public interest at stake.

ESD is taking the lead on the governor’s initiative and, where needed, will partner with sister agencies in control of specific sites. Empire State Development has already issued several requests for proposals ranging from a former prison in Watertown, a former DOT site in Suffolk County, and a former psychiatric hospital in Queens. While ESD may or may not choose to use its zoning override authority on a specific project, its right to do

so is well established. *Floyd v. Urban Development Corporation*, 41 A.D.2d 395 (1st Dep't 1973) ("The right to override zoning regulations must therefore be included [in the authority's statutory powers] since, absent that power, the corporation could be easily and effectively blocked in any proposed project."). Courts in a dozen or more other cases have upheld state entities' override authority in a wide variety of contexts (parking garages, train stations, horse racing, etc.). Importantly, the state authority need not remain the site owner to take advantage of a zoning override. Moreover, in an important decision this summer, the Court of Appeals reaffirmed the principle that litigants may not use a challenge to environmental review under the State Environmental Quality Review Act as a collateral attack on zoning matters. *Elizabeth Street Garden v. City of New York*, 2024 N.Y. LEXIS 828 (Court of Appeals 2024) (rejecting challenge to environmental assessment city conducted for affordable housing project).

Beyond Zoning Relief, State Agencies Can Offer Cost Relief in Other Unique Ways

Under the Public Authorities Accountability Act (PAAA), public authorities and public benefit corporations may dispose of their land only through public auction and for fair market value unless they can fit a sale or lease within a few exceptions. These exceptions include a disposition within the authority's "purpose, mission or governing statute ..." N.Y. Public Authorities Law 2897. Presumably this gives certain state authorities the ability to offer below-market sale prices and ground leases in exchange for robust affordability requirements. Courts have not much addressed the substantive requirements of the PAAA. But at least one court cast doubt on the public's right to standing to challenge a disposition allegedly in violation of the law.

Matter of Montgomery v. Metropolitan Transp. Auth., 25 Misc. 3d 1241(A) (Sup. Ct., N.Y. County 2009) (denying standing to public interest groups). Public authorities therefore retain significant leverage to use below-market sale and lease terms to secure affordable housing commitments.

State-owned land is exempt from local property taxes under the NYS Real Property Tax Law Section 404. While courts have broadly interpreted the law to reject challenges to tax exemptions for both public and private operators on state-owned land, it presents two limits to its use. First, to remain tax exempt the land must remain state owned, requiring a public authority to remain in title for an extended period of time and ground lease the site to a developer. Second, as a practical matter, a state agency will want its projects to have access to municipal services, which municipalities may not want to provide where there are no taxes. The result is generally a negotiation between the state agency and municipality over "payments in lieu of taxes" (PILOTs). Still, these PILOTs can be well below the property taxes that would normally be due and can incentivize affordable housing projects on top of the limited tax credits included in the 2024-2024 state budget.

It is hoped that the combination of property tax relief along with zoning relief, steep sale or lease discounts for affordable housing, and the new state-wide affordable housing tax credits (included in the state budget but not explored in this article) will allow the state's public authorities to plan for significant housing on state land for the first time in 50 years, to address a housing crisis that municipalities are unable and unwilling to solve.

Karen Meara and Christopher Rizzo are partners at *Carter Ledyard & Milburn* in its environmental and land-use group.